IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 10-0016

STATE OF MONTANA,

Plaintiff and Appellee,

v.

KIM A. NORQUAY,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Twelfth Judicial District Court,
Hill County, The Honorable Laurie McKinnon, Presiding

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STATEMENT OF ISSUES

1. Was Appellant's Confrontation right violated by the use of a video deposition of a temporarily unavailable witness?

2. Did the dynamite charge erroneously inject irrelevant considerations, impose undue pressure, and violate due process?

3. Was there prejudicial prosecutorial misconduct?

4. Did cumulative errors deprive Appellant of a fair trial?

SUMMARY OF CASE

The State charged Kim Norquay, Jr. (Norquay) by Amended Information with deliberate homicide, Mont. Code Ann. § 45-5-102(1)(b), alleging he was accountable for the aggravated assault of Lloyd Kvelstad during which Kvelstad died. (D.C. Doc. 41.) The State also charged tampering with evidence, Mont. Code Ann. § 45-7-207(1)(a), for allegedly washing his shoes to impair evidence. (D.C. Doc. 41.)

Trial by jury commenced on November 12, 2008. On November 21, 2008, the jury rendered a guilty verdict on both counts. (D.C. Docs. 197, 198.) Norquay was sentenced to concurrent terms of sixty-five years on the homicide count and ten years on the tampering count. (D.C. Doc. 264, attached as App. A.) Norquay's timely appeal followed. (D.C. Doc. 292.)

Other relevant background is discussed below.

SUMMARY OF FACTS

Lay Witness Testimony

On the evening of November 24, 2006, Norquay, James Main Jr., Joseph Red Elk, Jason Skidmore, Billy The Boy, and Kvelstad were drinking at Missy Snow's house. (Trial Tr. (hereinafter "Tr.") at 543.) Snow had a sexual relationship with Main and Kvelstad. (Tr. at 715-16, 725.)

At approximately 1:30 a.m., Nathan and Georgetta Oats arrived at Snow's house. (Tr. at 321.) Kvelstad was lying on the living room couch; his face was badly beaten and his pants were down. (Tr. at 322.) The Boy and Norquay were in the living room. (Tr. at 323-24.) Norquay was lying on the couch with a sweatshirt over his head and a blanket on him. (Tr. at 372.)

Nathan shook Kvelstad, who rolled onto the floor. (Tr. at 326.) Norquay said there was nothing wrong with Kvelstad and to leave him alone. (Tr. at 327.) Nathan told Georgetta to go to a neighbor and call 911, which she did. (Tr. at 327.) When Georgetta returned after about five minutes, Norquay still was lying on the couch. (Tr. at 363, 375.)

Main tried to leave, saying he wasn't going to jail. (Tr. at 327, 343.) Main tried to push past Nathan; the two wrestled. (Tr. at 327.) Nathan held Main until the police arrived. (Tr. at 327.) While they were wrestling, Norquay got up, stood there like he wasn't sure what was going on, and eventually left. (Tr. at 375-76.)

Half hour to an hour later, Norquay arrived at Selena Valdez's house, who lived a few blocks away. (Tr. at 653-54.) Norquay went to sleep in a recliner. (Tr. at 659-60.) In the morning, Kenneth Piapot noticed dried blood on Norquay's shoes and asked him where he got it; Norquay said he butchered a cow. (Tr. at 673.) Norquay wiped the blood off in front of Valdez, Piapot, and Valdez's friend. (Tr. at 676-77.) Piapot saw no blood anywhere else on Norquay. (Tr. at 678.)

Officer Daniel Waldron arrived on the scene. (Tr. at 410.) He described Main as very calm. (Tr. at 417.) Main spoke about his life and seemed like he thought his life was over. (Tr. at 440-41.) Main appeared to have been in a fight: he had a scrape on his forehead, blood on his sweatshirt and pants, a cut on his right pinky, and his hands were very red and puffy. (Tr. at 417-18.)

Norquay had no cuts or bruises on his hands. (Tr. at 965-66.)

Kvelstad was beaten beyond recognition, on the floor with his pants down and apparent excrement on his legs. (Tr. at 412-13.) There was a black string around his neck which evidence suggested could be Norquay's hoodie string. (Tr. at 478, 880, 1066-67.) The Deputy Medical Examiner was not certain of cause of death, whether head trauma plus severe intoxication, or ligature or manual strangulation. (Tr. at 1019.) There were no visual signs of sexual assault nor semen on anal swabs. (Tr. at 1017, 1214.)

The events prior to Kvelstad's death were highly disputed. Main told former Assistant Chief of Police George Tate he got into a fight with Kvelstad in the kitchen because he was jealous of Snow and because racial remarks turned serious. (Ex. EEE at 2:46-2:55, 8:04-8:25; Tr. at 981-92.) Kvelstad was bleeding, but got up after the fight and washed off. (Ex. EEE at 14:20-26.) Main cut his hand fighting Kvelstad. (Ex. EEE at 18:52-19:00.) Main went and laid down with Snow until the Oatses showed up. (Ex. EEE at 4:45-5:10.) Main did not think Kvelstad died from their fight. (Ex. EEE at 10:14-22.)

Norquay voluntarily spoke with Officer Tate multiple times. (Tr. at 875.) Norquay said he had gone to buy beer; upon his return, he noticed Kvelstad face down on the floor under a blanket with his pants down. (Tr. at 876-77.) He thought Kvelstad was passed out; he uncovered him and told him he shouldn't lie there with his pants down and to get up and have beer. (Tr. at 876-77.) He sat talking to Kvelstad until ten minutes later when Nathan and Georgetta Oats arrived. (Tr. at 877.) Initially he told Tate his hoodie had no string then later said he pulled it out at the table and then put it in the garbage. (Tr. at 885.) He denied kicking Kvelstad. (Tr. at 884.)

Norquay later told Tate he saw Main assault Kvelstad and tried to stop him. (Tr. at 976.) Norquay denied assaulting Kvelstad. (Tr. at 957.)

The Boy testified he had no idea how Kvelstad was killed. (Tr. at 517-18.)

Snow claimed to remember little. She recalled there was a fight between Main and Kvelstad that was racial and Main called Kvelstad pilgrim. (Tr. at 721.) While they were teasing Kvelstad, "the boys," including Norquay, got behind and made a humping motion. (Tr. at 700-01.) She did not recall Norquay slapping Kvelstad. (Tr. at 720.) She remembered Norquay playing with his hoodie string, then pulling it out and placing it on the table--hours before the fight. (Tr. at 700, 729.)

Snow saw Main put Kvelstad in a sleeperhold twice. (Tr. at 697, 720.) When asked if she saw how Kvelstad got beaten, she said she was not paying attention. (Tr. at 698.) Snow said Main came into the kitchen and told her Kvelstad was dead. (Tr. at 701.) Main took her to the back room and told her they were going to make love; they heard a knock at the door and Main wouldn't let her leave, then told her to lie, which Main denied. (Tr. at 702; Ex. EEE at 9:06-30.)

A few weeks later, on December 1, 2006, Snow was being booked into jail and started yelling at a white man; she called him "white guy," said her "man" would get him too, her man had killed a white man, and because he was white he would be next. (Tr. at 1310-14.)

The State relied heavily on Red Elk's testimony about events earlier in the night. According to him, Main started to pick on Kvelstad, becoming verbally assaultive. (Tr. at 545-47.) Main was talking about the American Indian

Movement, Thanksgiving, and pilgrims' mistreatment of Indians. (Tr. at 545.) After Kvelstad started speaking Native, Main got angrier; the two argued, but Kvelstad said he didn't want problems. (Tr. at 549.) Main grabbed Kvelstad and put him in a chokehold; Kvelstad passed out. (Tr. at 550.) Kvelstad regained consciousness and Skidmore pulled and ripped his underwear off. (Tr. at 574.) Skidmore also choked Kvelstad. (Tr. at 553.) Main put Kvelstad in another chokehold, but stopped after Skidmore told him to. (Tr. at 551.)

After Kvelstad got up, Skidmore and Norquay slapped him on the back and said they were just kidding around. (Tr. at 552.) Norquay gave Kvelstad a couple slaps on the face, joking and teasing. (Tr. at 552, 596.) When Kvelstad went to sit, Norquay started unzipping his pants and tugging on Kvelstad's pants, "saying he was going to fuck him right there." (Tr. at 553-54.) Skidmore told Norquay to not play like that. (Tr. at 554.) Norquay said he was kidding, both men pulled their pants up, and Kvelstad sat down. (Tr. at 554.)

Red Elk testified that later he heard Main, Norquay, and Skidmore talking about whether they should kill Kvelstad. (Tr. at 556.) Main brought up the idea. (Tr. at 585.) Red Elk did not think they were serious; it seemed like drunken nonsense and kidding, since Norquay had been teasing Kvelstad and was very drunk. (Tr. at 587.) Red Elk never saw Norquay kick Kvelstad, knock him down, or draw blood. (Tr. at 575.)

Kvelstad passed out drunk and was put into a bedroom. (Tr. at 558.) When Red Elk and Skidmore left, Kvelstad was alive and not bloody. (Tr. at 559.)

Red Elk omitted many of these details when he was interviewed immediately after the incident. (Tr. at 600.) He claimed he remembered the events better at trial. (Tr. at 602-03.)

Skidmore denied essentially all the details Red Elk described, including that Norquay slapped or teased Kvelstad; anyone choked Kvelstad; or anyone made racial remarks to Kvelstad. (Tr. at 1247-51.) Officer Tate testified he interviewed Skidmore on November 25, 2006; Skidmore told Tate he could exclude Norquay as a suspect because Norquay was too drunk and he laid down on the couch as Skidmore left. (Tr. at 1288-89.) OPD investigator William Buzzell testified that Skidmore told him Norquay was sleeping on the couch when he left. (Tr. at 1321-22.)

Sheila Walker testified that about two weeks after Kvelstad's death she was at Sylvia Crazy's house when Norquay showed up to use her phone. (Tr. at 524-25.) Norquay asked the other person on the phone whether she had heard he is a murderer. (Tr. at 530.) Walker thought Norquay was being stupid and making a joke. (Tr. at 535.)

Nicollete Stamper claimed Norquay called her around December 3 or 4, 2006. (Tr. at 1044, 1274.) She said Norquay was intoxicated. (Tr. at 1040.) She

claimed Norquay told her he and someone else were fighting Kvelstad and he put his sweater string around Kvelstad's neck to help the other guy. (Tr. at 1041.) Although Stamper claimed Norquay called her around December 3 or 4 and that he was intoxicated, Norquay was incarcerated, where alcohol is not permitted, from November 26 - December 13, 2006. (Tr. at 1301, 1304.)

Stamper claimed she received a letter from Norquay although she would not be able to recognize Norquay's handwriting. (Tr. at 1042.) She claimed he stated he used a hoodie string to choke Kvelstad. (Tr. at 1042.) The supposed confession letter was the only letter she had ever received from Norquay. (Tr. at 1053.) Although Stamper's habit is to keep all letters from friends, she claimed she could not find the letter. (Tr. at 1052.) Stamper testified she did not know where the letter came from, and claimed she did not remember telling defense counsel one week earlier that the letter had been postmarked Great Falls. (Tr. at 1051.) Stamper could not recall what she did with the letter and did not know why she didn't keep it. (Tr. at 1052.) She could not recall if she showed the letter to anyone or its length. (Tr. at 1053.)

Officer Tate testified that Stamper never mentioned any such letter during their interview. (Tr. at 1284.)

Expert Testimony

DNA was found on the ligature; Skidmore could not be excluded as a possible contributor nor could Kvelstad. (D.C. Doc. 179 (hereinafter "Depo.") at 27; Ex. 1; Tr. at 1221-22.) Norquay, Main, and Snow were excluded. (Depo. at 27.)

Main's blood was found on the side of the bathtub in Snow's bathroom. (Depo. at 32.) Kvelstad's blood was found in the bathroom and on the kitchen and living room ceilings. (Depo. at 32-33.)

Blood was found on Main, Norquay, and Snow's shoes, although significantly more on Main's boot. (Tr. at 1217.) Kvelstad's DNA was found on Snow's left shoelace, the tongue of Main's right boot, and the seam of Norquay's shoe. (Depo. at 40-42, 48.) It was also found on the back of Norquay's sweatshirt sleeve. (Depo. at 47.)

Main's own DNA was found in blood on his hands. (Depo. at 44.) It was also found in blood on Norquay's lower pant legs, his sweatshirt, and on both sides of his jacket. (D.C. Doc. 45-47, 51-52.)

Deborah Lougee, the State's expert in footwear impression identification, concluded that Norquay's shoe was consistent with an impression found on Kvelstad's sweatshirt. (Tr. at 1075, 1089.) Nothing in the impression was made

by Skidmore's shoe. (Tr. at 1147-48.) She was not able to positively conclude that Norquay's shoe caused the impression. (Tr. at 1089-90.)

Norquay's impression expert was William Bodziak, one of the best authorities. (Tr. at 1157.) Bodziak criticized Lougee's methods. (Tr. at 1369, 1386-88.) He strongly disagreed with Lougee's conclusions, stating there was not enough information in the impression to make any affirmative conclusions of a relationship with a particular shoe design, including Norquay's. (Tr. at 1376.) He could not exclude Norquay or Skidmore's shoes--or many other readily-available shoes with the same common pattern. (Tr. at 1387, 1390.) He found the impression tended more towards Skidmore's shoe. (Tr. at 1387.)

SUMMARY OF ARGUMENT

The State's DNA expert was pregnant and temporarily unavailable to testify in person. The State failed to make a good faith effort to secure her appearance. The admission of her video deposition violated Norquay's right to confront her at trial, and the State's heavily reliance on inadmissible DNA evidence prejudiced Norquay.

After the jury deadlocked the court gave a dynamite charge that injected irrelevant considerations and imposed undue pressure on the jury to reach a verdict, which denied Norquay a fair trial.

The prosecutor's personal statement of witness credibility, inflammatory misstatement of evidence, misstatement of law to remove the mens rea element, and attack on Norquay's exercise of his constitutional right to cross-examination deprived him of a fair trial. The Court should exercise plain error review of this claim; in the alternative, Norquay received ineffective assistance of counsel.

Cumulatively, these errors deprived Norquay of a fair trial.

ARGUMENT

I. ADMISSION OF A DEPOSITION OF A KEY STATE WITNESS VIOLATED NORQUAY'S CONFRONTATION RIGHTS.

A. Facts

A jury trial was set for May 12, 2008, but the date was continued until June 2, 2008, because Dr. Walter Kemp, Deputy State Medical Examiner, was unavailable. (D.C. Docs. 52, 58.)

Norquay filed an unopposed motion to continue the June date to allow further investigation. (D.C. Doc. 86.) On May 9, 2008, the district court held a conference at which the parties and court discussed scheduling. (5/9/08 Tr.) Megan Ashton, the State's DNA expert, was probably not available during the second half of November, while early November did not work for Dr. Kemp. (5/9/08 Tr. at 7.) The parties and the court agreed on January 5, 2009, for the start of the two-week trial. (5/9/08 Tr. at 13-14.) Counsel agreed to confirm the date

with their witnesses. (5/9/08 Tr. at 13.) Norquay waived his speedy trial rights up to January 5, 2009. (5/9/08 Tr. at 16.)

State counsel then learned that Ashton would be on maternity leave in January 2009. (5/22/08 Tr. at 5.) Ashton's due date was December 14, 2008.[1] (5/22/08 Tr. at 5.) Ashton would be on maternity leave through the beginning of February. (5/22/08 Tr. at 7; 10/10/08 Tr. at 7.) The State sought a November 12, 2008 trial date before Ashton was to begin maternity leave; Norquay agreed. (5/22/08 Tr. at 3.) Trial was moved up to November 12, 2008. (D.C. Doc. 96.)

There was no concern Ashton would be physically unable to testify during the January 2009 trial date; in fact, she said she could testify while on leave. (10/10/08 Tr. at 7.) The continuance, however, was a matter of convenience so Ashton would not have to testify while on leave. (10/10/08 Tr. at 7.)

On October 8, 2008, Norquay filed a motion to continue the November 12, 2008 trial date. (D.C. Doc. 113.) Two days earlier, Ashton informed defense counsel her doctor prohibited her from travelling to the November trial. (D.C. Doc. 113 at 2.) Even though the State earlier had agreed to a January 5, 2009 trial date, the State opposed the motion to continue, instead moving for an order to take, and present at trial, a video deposition. (D.C. Doc. 123.) Norquay opposed the

[1] Facts concerning Ashton's pregnancy and maternity are based on undisputed representations of counsel.

deposition on the grounds that its use at trial would violate his Confrontation Clause right to confront witnesses. (10/10/08 Tr. at 14-19, 25-26; D.C. Doc. 124.)

The district court denied Norquay's motion for a continuance and granted the State's motion for a deposition. (D.C. Doc. 126, attached as App. B.) Ashton's deposition was taken on November 6, 2008, with Norquay and counsel present. (D.C. Doc. 179.) Norquay renewed his objection to the deposition prior to it being taken and being played at trial. (11/06/08 Tr. at 16-17; Tr. at 649.) The district court again overruled the objection. (Tr. at 649-52, attached as App. C.) The video was played for the jury. (Tr. at 1223.)

B. Standard of Review

Whether the use of a witness's deposition at trial violated Norquay's confrontation right is a question of constitutional law; accordingly, this Court's review is plenary. *State v. Parker*, 2006 MT 258, ¶ 11, 334 Mont. 129, 144 P.3d 831.

C. Analysis

The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witness against him . . . ." Article II, Section 24 of the Montana Constitution states: "In all criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . . ."

Under the Confrontation Clause, "[a] witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination." *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2531 (2009) (citing *Crawford v. Washington*, 541 U.S. 36, 54 (2004)).

Ashton's videotaped deposition, made for use by the prosecution against Norquay at trial, is the very type of testimonial hearsay that implicates the Confrontation Clause. *Crawford*, 541 U.S. at 51-52. Norquay had the opportunity to cross-examine Ashton at the deposition. (D.C. Doc. 179.) Nevertheless, Norquay had a right to confront Ashton face-to-face at trial before the jury because the State failed to establish that Ashton was unavailable for Confrontation Clause purposes.

When examining a Confrontation Clause challenge to hearsay testimony, this Court has looked to the definitions of unavailability for the hearsay exceptions for unavailable witnesses in Mont. R. Evid. 804(a). *E.g.*, *State v. Hart*, 2009 MT 268, ¶ 24, 352 Mont. 92, 214 P.3d 1273. Under Rule 804(a)(4), a witness may be considered unavailable if she "is unable to be present to testify at the hearing because of death or then existing physical or mental illness or infirmity."

However, the Confrontation Clause also requires the State to demonstrate it made a "good faith effort" to present the witness: "a witness is not 'unavailable'

for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-25 (1968). The effort required is a question of reasonableness, based on the totality of the circumstances. *Hart*, ¶ 24.

The State failed to prove it made a good faith effort to have Ashton appear in person at trial before resorting to using her deposition. Although the parties and court tentatively agreed to a January 5, 2009 trial date, the State later requested trial be moved up to November 12, 2008, for Ashton's convenience. Having learned that Ashton in fact would not be physically able to testify at the November trial, the State made no further efforts whatsoever to present Ashton in person for trial. Under the totality of the circumstances of this case, a good faith effort to have Ashton personally appear included seeking a reasonable continuance.

The "usual remedy for the temporary unavailability of a witness" is a continuance to allow the witness to appear in person. *Sahagian v. Murphy*, 871 F.2d 714, 715-16 (7th Cir. 1989). Indeed, "appellate courts are rarely called upon to examine a claim of temporary unavailability" because most cases are handled by continuance. *Sahagian*, 871 F.2d at 715.

While this Court has not decided a temporary unavailability case involving a pregnant witness, the Fifth Circuit decided such a case in *Peterson v. United States*, 344 F.2d 419, 425 (5th Cir. 1965), finding the district court erred in

admitting prior testimony of a witness who was unavailable at the time of trial because of pregnancy: "if the Government desired to use [her] testimony, it should have requested a continuance to a time when she could probably be present." It concluded that "the Government should have been required to elect either to proceed without [her] testimony or to request a continuance." *Peterson*, 344 F.2d at 425. *See also*, *United States v. Jacobs*, 97 F.3d 275, 282 (8th Cir. 1996) (Confrontation Clause violated where pregnant witness was hospitalized during testimony and allowed to finish testimony by telephone; no showing that witness was unable to recover and appear in person within reasonable time); *Stoner v. Sowders*, 997 F.2d 209, 212-13 (6th Cir. 1993) (playing of video deposition of elderly witnesses taken the day before trial violated Confrontation Clause; state failed to prove duration and severity of illness such that postponement was not possible).

Many treatises agree the constitutional strictures of the Confrontation Clause typically require some delay in trial to permit a temporarily disabled witness to recover and appear in person, and such cases are handled by continuance. Joseph M. McLaughlin, ed., 5 Weinstein's Federal Evidence, 2d ed., § 804.03[5][b] ("In criminal cases where the hearsay statement is being offered against the accused, some delay to permit a temporarily disabled witness to attend seems imperative under the Confrontation Clause if the nature of the disability is such that its

alleviation or disappearance can be expected."); John W. Strong, ed., 2 McCormick on Evidence, 5th ed., § 253 (1999); Stephen A. Saltzburg and Kenneth R. Redden, Federal Rules of Evidence Manual, 4th ed., 986 (1986); 5 Wigmore Evidence § 1406 (Chadbourn rev. 1974).

The State failed to establish that a continuance was not a reasonable means to allow Ashton to appear as part of its good faith effort to present her at trial. Ashton's inability to appear was temporary, lasting until she gave birth on or about December 14, 2008. She would be able to testify in person while on maternity leave. The State made no showing that trial was not possible soon after December 14, 2008. The evidence in the record was that the parties and court were available for trial in January 2009. Norquay had already waived his speedy trial rights through January 2009. The State produced no evidence that trial could not happen in January or sometime soon. The State made no effort to try to arrange for Ashton's personal appearance, instead insisting that trial go forward in November.

As in *State v. Widenhofer*, 286 Mont. 341, 950 P.2d 1383 (1997) (failure to make good faith effort where State subpoenaed out-of-town witness the night before trial), here "the prosecution's use of hearsay testimony was a convenience, not a necessity."

Accordingly, the district court erred when it held that admission of Ashton's deposition did not violate Norquay's Confrontation Clause rights. The court based

its determination that Ashton was unavailable in part on its conclusion--unsupported by the record--that a continuance of at least five months would be necessary. (Tr. at 650.) The State adduced no evidence of the duration of Ashton's limitations on travel; the only information in the record was that Ashton could not travel until her due date, December 14, 2008, and that she would be available to testify thereafter.

Moreover, the court made no finding that a continuance was not reasonable under the totality of the circumstances. *Hart*, ¶ 24. The court vaguely referred to the difficulty of scheduling this matter. (App. B at 3.) Yet, the parties and the court never actually attempted to reschedule the trial. They had previously agreed on a January 2009 date. There is nothing in the record showing that January would not still work or a reasonable time thereafter. The State was required to make a good faith effort--at the very least, attempt to continue the trial or prove a continuance was not reasonable.

The court also relied on the State's concern about "problems" presenting its witnesses if trial were delayed. (App. B at 3.) The concern was speculative. The State expressed no concerns about witnesses when it had earlier agreed to the January 2009 trial date. The State adduced no evidence to support its supposed new concerns. Conclusory allegations of inconvenience to the State in gathering

witnesses cannot trump a defendant's right to confront witnesses against him face-to-face at trial, nor do those concerns render Ashton unavailable.

Finally, the court determined Norquay's confrontation rights were "protected" because he was present at the deposition and able to cross-examine Ashton through counsel. (App. B at 4.) This misses the point. The video deposition was admissible only if the State first made the threshold showing that Ashton was unavailable to appear in person. *Melendez-Diaz*, 129 S.Ct. at 2531. The State failed to do so.

The admission of Ashton's hearsay testimony violated Norquay's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution. Moreover, the error was not harmless.

The erroneous admission of Ashton's deposition, and the DNA evidence to which she testified, was trial error. *See State v. Van Kirk*, 2001 MT 184, ¶ 40, 306 Mont. 215, 32 P.3d 735. Under *Van Kirk*, ¶ 44, the State must point to other evidence that proved the same facts as the evidence, and demonstrate the quality of the evidence was such that there was no reasonable possibility that it contributed to Norquay's conviction. Similarly, under federal law the State must establish the error was harmless beyond a reasonable doubt; relevant factors include "the importance of the witness' testimony in the prosecution's case, whether the

testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986).

The harmlessness assessment "cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988).

Ashton's testimony on her DNA analysis established that Kvelstad's blood was found on the shoes of Norquay, Main, and Snow; on Norquay's sweatshirt; and in the bathroom and the kitchen and living room ceilings. (Depo. at 32-33, 40-42, 47-48.) It established that Main's blood was found on his own hands and on Norquay's clothes, as well as in the bathroom. (Depo. at 32, 44-47, 51-52.)

The State focused heavily on the DNA evidence. It acknowledged there were "holes in what happened in this case," that its witness testimony was limited to events before and after the assault, and it had no witness testimony as to what happened during the assault. (Tr. at 1475, 1477-78.) Thus, it invited the jury to look to the DNA evidence to fill the "hole." (Tr. at 1478.) Norquay did not dispute that he was at the scene. His defense was that Main assaulted and killed

Kvelstad though he tried to stop him; Skidmore may have participated by using the ligature; and he spent most of the time lying on the couch and was too drunk to have participated. (Tr. at 1515-22, 1533-34.)

The State relied on Ashton's testimony to establish that Norquay participated in the assault and to rebut Norquay's defense. It used DNA evidence of Kvelstad's blood on the shoes of Norquay, Main, and Snow to establish that Kvelstad's traumatic facial injuries were caused by Norquay, Main, and Snow kicking him. (Tr. at 1492.) The State pointed to DNA evidence of Kvelstad's and Main's blood found in various rooms, and that Main was bleeding, to establish that this was not a single fight between Main and Kvelstad, but rather an extensive assault across multiple rooms by more than just Main. (Tr. at 1478-80.) It rebutted Norquay's defense that he was merely at the scene but did not participate by pointing to DNA evidence of Kvelstad's and Main's blood on Norquay, specifically that Main's blood on Norquay's front and back was inconsistent with someone lying down. (Tr. at 1491-92.) It used the same evidence to establish that Norquay was "in the fray with Main," "up close, tight and personal with Mr. Main," and a participant with Main in the assault. (Tr. at 1492, 1494.) The State also used DNA to rebut the notion that Skidmore was involved, arguing the lack of Main and Kvelstad's blood on Skidmore established he wasn't there. (Tr. at 1496-97.)

The State also used DNA evidence to prove the tampering with evidence charge, establishing that Norquay wiped Kvelstad's blood off his shoes and contradicting his statement that it was cow's blood. (Tr. at 1502-03, 1565.)

The other admissible evidence did not prove the same facts and was not cumulative. No other evidence contradicted Norquay's claim the blood he wiped off was cow's blood. No other evidence established to whom the blood on the shoes, clothes, and crime scene belonged.

While Red Elk testified Norquay teased Kvelstad earlier, there was no witness testimony that Norquay participated in the assault. Red Elk claimed Main brought up the idea of killing Kvelstad to Norquay and Skidmore but it seemed like drunken nonsense. While there was evidence Norquay's hoodie string was used, he had removed the string hours earlier making it available for anyone to use, and Skidmore's DNA was found on it. Unlike Main, Norquay had no injuries establishing he had been in a fight.

Nor can the State establish that, qualitatively, by comparison, the tainted evidence would not have contributed to the conviction. The State clearly thought Ashton's testimony on DNA evidence was critical. It invited the jury to review her DNA summary. (Tr. at 1493.) Indeed, the prosecutor opined that "the DNA alone proves that Mr. Norquay was a participant [in] the assault." (Tr. at 1494.)

Red Elk's credibility was questionable: he claimed to remember vivid details of the night better at trial than when he was interviewed. Nicollete Stamper's credibility was clearly impugned: she claimed to have received a drunken confession phone call from Norquay during a time when he was incarcerated without alcohol, and a confession letter that she did not keep notwithstanding her normal practice to keep all letters from friends and which she never mentioned before trial to Officer Tate. Testimony of the State's footwear impression expert was weak at best. At most it established only that Norquay's shoe may have left an impression on Kvelstad's sweatshirt; she could not determine what force was used, when it happened, or whether it was by direct or secondary transfer. (Tr. at 1154-55.)

The State's case was not strong; indeed, the jury deadlocked for hours. Ashton's expert testimony and DNA evidence qualitatively was much stronger than the State's other evidence. The State cannot establish there is no reasonable possibility that the DNA evidence did not contribute to Norquay's convictions, *Van Kirk*, ¶ 44, or that the error was harmless beyond a reasonable doubt, *Van Arsdall*, 475 U.S. at 684. The district court erred and prejudiced Norquay by admitting Ashton's video testimony when she was not unavailable.

II. THE DYNAMITE INSTRUCTION WAS ERRONEOUS AND VIOLATED DUE PROCESS.

A. Relevant Facts

The jury was dismissed to deliberate at 12:55 p.m. on November 20, 2008. (Tr. at 1573; D.C. Doc. 192.) At approximately 7:30 that evening, Judge McKinnon sent a note to the jury asking if it was making progress on its deliberations. (D.C. Doc. 191.) The jury responded "NO, deadlock." (D.C. Doc. 191.) The court advised the jury it would release them and recessed at 7:51 p.m. (D.C. Doc. 192.)

The jury commenced deliberations the next morning at 8:36 a.m. (D.C. Doc. 196.) At approximately 9:00 a.m. the jury sent a note: "We are going absolutely nowhere and it doesn't look like anyone is going to change their mind. We have been in this stale mate for over 6 hours." (D.C. Doc. 193.) Thus, the jury had deliberated more than seven hours, more than six hours of which was a "stalemate."

Judge McKinnon told counsel she "had been told" the jury had reached a verdict on one of the two counts, but she did not know which. (Tr. at 1577.) Norquay objected to the court giving a cautionary "dynamite" instruction. (Tr. at 1577-78.) He also objected to the language of the proposed instruction, on the grounds that it violated due process. (Tr. at 1578-81.) The court overruled the objection and gave Instruction 31, identical to pattern jury instruction No. 1-121,

"Cautionary Instruction for Potentially Hung Jury." (Tr. at 1580; D.C. Doc. 31, attached as App. D.)

The jury was sent back to deliberate at 9:53 a.m. (D.C. Doc. 196.) The dynamite charge worked. About an hour and a half after receiving the instruction, the jury wrote a note stating it had reached a verdict. (D.C. Doc. 194.)

B. Standard of Review

This Court generally reviews a district court's decision regarding instructions for abuse of discretion. *State v. Bieber*, 2007 MT 262, ¶ 22, 339 Mont. 309, 170 P.3d 444. Where, as here, a jury instruction raises a constitutional issue, however, this Court reviews the district court's determination of the issue for correctness. *See State v. Anderson*, 2008 MT 116, ¶ 17, 342 Mont. 485, 182 P.3d 80.

C. Analysis

The language of the dynamite instruction injected improper considerations into the jury's deliberations and imposed undue pressure to reach a verdict. The instruction was erroneous and deprived Norquay of due process.

The instruction stated in relevant part:

> The ultimate responsibility of the jury is to render a verdict in this cause. . . .
>
> The final test of the quality of your service will be in the verdict which you return to this Court. It is only by rendering a verdict in this cause that you can make a definite contribution to efficient judicial administration as you arrive at a just and possible verdict.

(App. D.)

Although this Court has approved the pattern jury instruction containing this language, it has not specifically discussed the above-quoted language Norquay challenges. *See Bieber*, ¶¶ 69-70; *State v. Bell*, 225 Mont. 83, 94, 731 P.2d 336, 343 (1987); *State v. Cline*, 170 Mont. 520, 540, 555 P.2d 724, 736 (1976). To the extent it has implicitly approved the language, the Court should revisit those decisions.

Six sister state appellate courts have addressed language similar to the above-quoted language. Maryland's highest court found reversible error in a "duty to deliberate" instruction given to a jury prior to deliberations, that included nearly identical language informing the jurors that the "final test" of their service would lie in their verdict, and they would make a "definite contribution to efficient judicial administration" if they arrived at a just and proper verdict. *Thompson v. Maryland*, 371 Md. 473, 479-80, 810 A.2d 435, 439 (2002). Even though the instructions included language about not yielding one's honest conviction, the

court found the language deviated from the requirement that jurors not surrender their honest beliefs to reach a verdict:

> This concept of a "final test" implies that there is a standard of service to which a juror should aspire, one that requires a verdict to be reached rather than one that requires consideration of individual conviction and whether individual conviction thoughtfully can be reconciled with collective judgment. Because a verdict cannot be reached without unanimity, the "final test" language logically implies that a "good" juror acquiesces in a verdict rather than adheres to his or her own judgment.

Thompson, 371 Md. at 486, 810 A.2d at 443.

The District of Columbia's highest court agrees: "[j]urors should not be told impliedly that they fail the 'test' of responsible service if they do not overcome their 'opinions' and reach agreement on a verdict." *Jones v. United States*, 946 A.2d 970, 974 (2008) (finding error but not plain error).

The Supreme Court of Idaho addressed similar language in *State v. Flint*, 114 Idaho 806, 761 P.2d 1158 (1988). The court found a dynamite instruction unduly pressured a jury because it was read to the jury after considerable deliberation, not before, and included language requiring the jury to consider "efficient judicial administration." The court cited a lower court determination that while such language "may seem innocuous," "the implicit reference to cost and inconveniences gives the jury the inescapable message that criminal justice would not be served if they failed to return a verdict." *Flint*, 114 Idaho at 812, 761 P.2d at 1164.

Oklahoma is the only state besides Montana to have addressed a dynamite charge containing language of "final test" and "definite contribution to efficient judicial administration" and found no error; the court, however, did not expressly discuss the language. *Robinson v. Oklahoma*, 556 P.2d 286, 287-88 (Okla. Crim. App. 1976). The court later backed away from *Robinson*, creating a requirement that all dynamite charges inform jurors they are not being forced to agree and must decide the case for themselves. *Miles v. Oklahoma*, 602 P.2d 227, 228 (Okla. Crim. App. 1979). Oklahoma's current pattern instruction for deadlocked juries does *not* include this language. Oklahoma Uniform Jury Instructions, Criminal 2d Edition, 10-11 (attached as App. E).

A California appellate court found no reversible error in an instruction containing the "final test" and "definite contribution" language in *California v. Moraga*, 244 Cal. App. 2d 565 (1966); there, however, the language was not in a dynamite instruction to a deadlocked jury but part of an instruction entitled "How Jurors Should Approach Their Task," given before deliberations. The Supreme Court of North Carolina upheld the identical pre-deliberation instruction in *North Carolina v. Bryant*, 191 S.E.2d 745, 750-51 (1972), based in part on *Moraga*. Notably, California's current version of the instruction has stricken this language. CALJIC No. 17.41 (attached as App. F).

Thus, the weight of extra-jurisdictional authority supports a finding that it is error to include this language in dynamite charges to deadlocked juries.

Norquay's jury was incorrectly instructed to consider matters entirely irrelevant to their deliberations, specifically the "quality" of their service, whether they will make a "definite contribution to the administration of justice" by rendering a verdict, and whether they will pass the "final test" by rendering a verdict. The instruction was error, because it "inject[ed] extraneous and improper considerations into the jury's debates," *California v. Gainer*, 566 P.2d 997, 1006 (Sup. Ct. Cal. 1977), and created "the potential that the jurors' deliberation was influenced by concerns irrelevant to their task." *United States v. Eastern Medical Billing, Inc.*, 230 F.3d 600, 613 (3d Cir. 2000). This in turns created the unacceptable "possibility that the jury reached its subsequent verdict for reasons other than the evidence presented to it." *Eastern Medical Billing, Inc.*, 230 F.3d at 613.

Moreover, it is incorrect to tell jurors they are "bad jurors" if they hold onto their honest convictions in the face of differing opinions, thus failing to reach a verdict. The failure to reach a unanimous verdict after careful deliberation is a valid contribution to the justice system. *Flint*, 761 P.2d at 1164. It holds the State to its burden to convince twelve jurors of guilt beyond a reasonable doubt.

Nor should jurors face the pressure of a judge warning them they will fail the "final test" of their service if they fail to reach a verdict. A juror who differs from the majority faces not only peer pressure, but also a judicial admonition that he must aspire to pass the final test by rendering a verdict. *Thompson*, 371 Md. at 486, 810 A.2d at 443. The instructions were error.

Additionally, the injection of irrelevant considerations and undue pressure violated Norquay's due process right to a fair trial by jury under Article II, Section 17 of the Montana Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. *See Idaho v. Clay*, 112 Idaho 261, 263, 731 P.2d 804, 806 (Ct. App. Idaho 1987); *Lowenfield v. Phelps*, 484 U.S. 231, 241 (1988) ("Any criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body.").

The error was not harmless. Courts, including this Court, have found prejudice based on the content of a dynamite instruction, where, as here, the instruction contains language that will improperly coerce the jury, *State v. Randall*, 137 Mont. 534, 542, 353 P.2d 1054, 1058 (1960), or inject improper considerations into deliberations, *Thompson*, 371 Md. at 476, 487, 810 A.2d at 437, 443-44.

Other courts have considered additional factors, all of which weigh in favor of finding prejudice here. Giving a dynamite instruction to a deadlock jury (as here), as opposed to part of the general charge before deliberations, weighs in favor

of prejudice. *E.g., Eastern Med. Billing*, 230 F.3d at 614; *Idaho v. Martinez*, 122 Idaho 158, 162, 832 P.2d 331, 335 (Ct. App. Idaho 1992).

The Third Circuit considers the evidence presented; where the evidence is "overwhelming" it may find harmless error. *Eastern Med. Billing*, 230 F.3d at 614. Here, the evidence was not overwhelming. The State's case rested largely on erroneously admitted DNA evidence. Its witnesses to events before and after the homicide provided only circumstantial evidence and suffered from questionable credibility. The jury did not find the evidence overwhelming, given the many hours they spent deadlocked.

The Court should remand for a new trial by a jury free of the influence of the erroneous instruction.

III. THE PROSECUTOR ENGAGED IN MISCONDUCT.

The prosecutor's summation was rife with improper comments, including misstatements of evidence, misstatements of law, and attacks on Norquay's exercise of his constitutional rights. This misconduct deprived Norquay of his right to a fair and impartial trial guaranteed by the Sixth Amendment of the United States Constitution and Article II, Section 24 of the Montana Constitution. *See State v. Hayden*, 2008 MT 274, ¶ 27, 345 Mont. 252, 190 P.3d 1091. Norquay did not object to the prosecutor's comments. He asks the Court to exercise plain error review. In the alternative, he received ineffective assistance of counsel.

A. Standard of Review

This Court may invoke common law plain error where the alleged error implicates a fundamental right and failing to review the error may result in a manifest miscarriage of justice, leave unsettled the question of the fundamental fairness of the trial, or compromise the integrity of the judicial process. *State v. Finley*, 276 Mont. 126, 137, 915 P.2d 208, 215 (1996).

Ineffective assistance of counsel claims are mixed questions of law and fact which this Court reviews de novo. *State v. Kougl*, 2004 MT 243, ¶ 12, 323 Mont. 6, 97 P.3d 1095.

B. Vouching

A prosecutor may not offer his personal opinion on witness credibility. *State v. Green*, 2009 MT 114, ¶ 33, 350 Mont. 141, 205 P.3d 798.

Red Elk's testimony at trial differed dramatically from what he told Officer Tate immediately after the incident. The *only* explanation Red Elk gave--on direct and cross-examination--was that he remembered events better at trial. (Tr. at 600, 602-03.)

The prosecutor, however, ignored the evidence and concocted his own explanation:

> Joseph has to walk out of that police station by himself, alone in this community. Does anybody expect that Joseph is going to sit there for that 17-minute interview and tell about what these men did. Do we expect that to be a natural thing for a 15-year old to do, or do we

> expect that Joseph's going to do exactly what Billy knew to do, to keep your mouth shut.
>
> Billy The Boy knows to keep his mouth shut and Joseph was aware of that too. But Joseph is interviewed two other times and that's when he tells what happened. . . .
>
> Now, I think in a perfect world we would want Joseph to tell Mr. Tate what happened right away, in a perfect world. But this isn't a perfect world. What happens with Joseph is interesting, I think it's about redemption. Joseph comes into this courtroom, through these doors, in this community, he comes in here and he tells you what happened. He tells you about what these men did and we are going to fault him for that? . . .

(Tr. at 1487-89.)

Red Elk was not alone; his mother was with him. (Tr. at 889.) He never testified he kept his mouth shut out of fear but then chose to tell the truth at trial. While the prosecutor was entitled to argue about which version of Red Elk's story was true, *Green*, ¶ 34, he was not entitled to base that argument on his opinion as to Red Elk's "redemption," contradicted by Red Elk's own testimony. The comment was prejudicial: Red Elk's testimony was key, his credibility was at issue, and his own explanation for his dramatically different story was implausible.

C. Misrepresenting Evidence

Red Elk testified that Norquay had his own pants ready to unbutton and was tugging on Kvelstad's pants, "saying he was going to fuck him right there." (Tr. at 553-54.) He said Norquay was drunk and just kidding around. Skidmore also

perceived it as teasing, telling Norquay to "not play like that." Norquay said he was just kidding. Red Elk never testified Norquay threatened to "rape" Kvelstad.

A jury could reasonably conclude Norquay was joking around when he said he was going to "fuck" Kvelstad. The prosecutor, however, never gave them the chance. He repeatedly misrepresented what Red Elk's testimony had been, saying Red Elk testified that Norquay said he was going to "rape" Kvelstad.

First, the prosecutor characterized the event as an "attempted rape": "And Joseph testified in court to what he saw. . . And Mr. Norquay directed -- or attempted to rape Lucky." (Tr. at 1487.)

Then, the prosecutor misstated Red Elk's testimony and inflamed the jury by suggesting Norquay did rape Kvelstad:

> *So much of what [Red Elk] said came true*. Lucky was killed, *talking about raping him*. You saw the condition of his body. You saw the fact that Mr. Norquay had wet underwear. He had another pair of wet underwear that had brown stains, saw the fact that Lucky didn't have any underwear on. *And he tells you about Mr. Norquay's, prior to his leaving what was said,* that they are going to kill Lucky and *that he wanted to rape Lucky.*

(Tr. at 1490.)

Later, the prosecutor against misstated Red Elk's testimony, also suggesting he had personal knowledge of the supposed facts: "Not only does the DNA and the footprint, the State would argue, show that Mr. Norquay was involved with committing this offense with Mr. Main, you know the condition of Lucky's body

and *we know what Joseph said about Mr. Norquay wanting to rape Lucky*." (Tr. at 1498-99.)

The prosecutor repeated his misstatement: "Joseph testified that he made these comments about wanting to rape Lucky." (Tr. at 1504.) The other prosecutor repeated the misstatement one more time during rebuttal closing. (Tr. at 1568 ("Red Elk heard Norquay say that he was going to rape Lucky.").)

Having been told at least five times that Red Elk testified that Norquay said he would "rape" Kvelstad, any juror who remembered Red Elk's testimony differently (i.e., correctly), would begin to doubt his memory. This may be what happened: the jury requested a transcript of Red Elk's testimony and his interview with Tate, which was denied. (D.C. Doc. 186.)

The State never charged Norquay with rape. The repeated references to Norquay saying he wanted to "rape" Kvelstad misstated the evidence so that the jury would not interpret the event as teasing but rather something much more sinister. The State then used the supposed rape threat to show Norquay's state of mind and undermine his defense of having merely been present at the scene. (Tr. at 1490, 1499.)

While the prosecutor was entitled to comment on the evidence, *Green*, ¶ 33, he is not entitled to misrepresent that evidence. Rape is a highly charged allegation, even moreso when it involves two men. The repeated rape comments

were inflammatory and prejudicial. The fact they came from the prosecutors only added to their impact. Even the judge came to believe that Red Elk testified Norquay threatened to rape Kvelstad, repeating the erroneous statement in the judgment. (App. A at 3.)

D. Misstating Law

A prosecutor may not misstate the law. *State v. Sanchez*, 2008 MT 27, ¶ 54, 341 Mont. 240, 177 P.3d 444. The prosecutor repeatedly misstated the elements of deliberate homicide by removing the mens rea element. The State's theory was deliberate homicide by accountability under the felony murder rule: the State contended Norquay aided, abetted, or solicited Main in the commission of aggravated assault, resulting in Kvelstad's death. (D.C. Doc. 41 at 1-2.) The State was required to establish that Norquay had the mens rea for accountability--the "purpose to promote or facilitate the commission" of aggravated assault. Mont. Code Ann. § 45-2-302(3). Nevertheless, the prosecutor repeatedly told the jury it had to find only that Norquay participated in the assault, failing to explain it also had to find Norquay had the *purpose* to promote or facilitate the aggravated assault.

The prosecutor read the definition of accountability to the jury, but then claimed Norquay was accountable simply by having participated. (Tr. at 1482-83.) The prosecutor repeats it, again failing to mention mens rea: "And what we are

saying is that Mr. Norquay is legally accountable for the offense of aggravated assault. He aided, abetted, he assisted somebody in committing that offense." (Tr. at 1484.)

The prosecutor later adds his personal interpretation:

> So, ladies and gentlemen, I think what the instructions tell you is that you can't participate, you can't assist somebody in killing somebody and not commit an offense. It's illegal to assist, if you believe that Mr. Norquay assisted Mr. Main in killing Lucky, and Lucky died, I believe that's what the instructions reflects [sic]. That it's an illegal act and that's the act that we have charged.

(Tr. 1484-85.) The prosecutor was wrong: it's illegal to assist somebody in killing only if you possess the requisite mens rea. The State was required to prove mens rea, but instead repeatedly told the jury to ignore it. The State's parting words were to remind the jury, erroneously, that it only had to find Norquay participated in an aggravated assault:

> Ladies and gentlemen, just in wrapping up, the State has not alleged that Mr. Norquay killed Lucky Kvelstad. We have alleged that he committed the offense of participating in aggravated assault. And once that offense was committed and then Mr. Kvelstad died of the commission of the offense, of the commission of [deliberate homicide][2].

(Tr. at 1503.)

[2] The transcript states "commission of aggravated assault" although "deliberate homicide" clearly is what was intended. Either there was a transcription error or the prosecutor misspoke.

This case is distinguishable from *Sanchez*, ¶ 58, where the Court found no prejudice by the prosecutor's misstatement of the law where the jury was given clear and correct instructions. The State's theory of deliberate homicide by accountability under the felony murder rule was complicated. The jury had to piece together multiple instructions on deliberate homicide and accountability to apply the State's theory. (D.C. Doc. 195.) The jury indicated its confusion, sending a note asking for the definitions of accountability and commission, which were denied because the jury had instructions. (D.C. Doc. 189.) The prejudicial impact of the State's misstatement of the law, which simplified what the jury was required to find while at the same time removing a required element, is greater where the State's theory is complex. Moreover, the State's evidence was not so strong as to presume no prejudice, as indicated by the jury's deadlock and discussed above.

E. Attacking the Defense

The prosecutor attacked the defense for exercising Norquay's right to cross-examine witnesses. The prosecutor said: "Now, it seemed like the defense cross-examined Nathan [Oats] pretty hard. I don't know how you can ask more of this guy. He's out enjoying the night with his wife. He comes there, he sees this body and he does everything he can do to stop Mr. Main. I don't know how you can really take issue with what he's trying to do there." (Tr. at 1486.) After inventing

the story about Red Elk's redemption, the prosecutor attacked the defense for questioning Red Elk's change in story: "But [Red Elk] comes in here and he tells it in front of his community, and the defense faults him for that. The defense goes after him on the stand." (Tr. at 1489.)

"[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." *Pointer v. Texas*, 380 U.S. 400, 405 (1965). Just as it is improper and prejudicial for a prosecutor to use a defendant's invocation of his *Miranda* rights against him, so too was Norquay prejudiced by the prosecutor's use of the exercise of his right to cross-examine witnesses against Norquay to suggest at best he is playing dirty and at worst that he is guilty. *See State v. Wagner*, 2009 MT 256, ¶¶ 14-21, 352 Mont. 1, 215 P.3d 20.

F. Plain Error

Norquay requests the Court exercise plain error review. The evidence against Norquay was not strong and the legal theory was not straightforward. Red Elk was a key witness who gave a weak explanation as to inconsistencies in his stories; the prosecutor's invention of a story of redemption unsupported by the evidence prejudiced Norquay's ability to attack Red Elk's credibility, as did the prosecutor's attack on Norquay for exercising his right to cross-examination. The prosecutor's misstatement of the evidence to inject inflammatory allegations of

rape, as well as incorrect explanations of the State's complicated legal theory to remove the mens rea element, implicate Norquay's right to a fair trial and calls into question the fundamental fairness of the trial. *Hayden*, ¶¶ 28, 30.

Plain error review is appropriate where, as here, the jury would be susceptible to prosecutorial influence where the legal theory was complicated and the jury indicated deadlock, suggesting after two days of deliberation the evidence was not overwhelming. There was an especially heightened danger of the prosecutor invading the role of the jury and the jury adopting the prosecutor's views. *Hayden*, ¶ 33. Moreover, plain error review is appropriate where a prosecutor comments negatively on a defendant's exercise of his constitutional right--here, to cross-examination. *E.g.*, *Wagner*, ¶¶ 17-21.

G. Ineffective Assistance of Counsel

In the alternative, Norquay received ineffective assistance of counsel. The Sixth Amendment to the United States Constitution and Article II, Section 24 of the Montana Constitution guarantee a defendant's right to assistance of counsel. This court applies the test of *Strickland v. Washington*, 466 U.S. 668 (1984): a defendant "must demonstrate that (1) counsel's performance was deficient or fell below an objective standard of reasonableness, and (2) establish prejudice by demonstrating that there was a reasonable probability that, but for counsel's errors,

the result of the proceeding would have been different." *Kougl*, ¶ 11 (internal quotation marks omitted).

This Court will review an ineffective assistance of counsel claim on direct appeal where there is no plausible tactical justification for the attorney's action or omission. *Kougl*, ¶¶ 14-15.

There is no plausible tactical justification for counsel's failure to object to the prosecutor's misconduct and request a curative instruction. While an attorney may tactically decide to refrain from objecting to one or even a few inappropriate comments, there is no justification for failing to object to so many prejudicial comments as here: There was no excuse for failing to object to the prosecutor's inflammatory repetition of "rape." There is no possible tactical advantage to letting the State attempt to decrease its burden by removing the mens rea element. There is no reason to let the prosecutor concoct a dramatic "redemption" story to explain Red Elk's inconsistent stories, contradicted by Red Elk's own, less plausible explanation, nor there is there any reason to let the prosecutor attack Norquay for exercising his constitutional rights.

Because there is no plausible justification for counsel's failure, his performance was deficient and the first prong of *Strickland* is met. *Kougl*, ¶ 24. *Strickland*'s second prong is met because "there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been

different." *State v. Rose*, 1998 MT 342, ¶ 19, 292 Mont. 350, 972 P.2d 321. As discussed above, the State's evidence against Norquay was not strong and its legal theory was complicated. There was great danger the jury would adopt the prosecutor's view, be influenced by his inflammatory comments, and use his simplified legal instructions that removed the mens rea requirement. Counsel's failure to object and request a curative instruction failed to cure the prejudice caused by the prosecutorial misconduct.

IV. CUMULATIVE ERROR

"The doctrine of cumulative error requires reversal of a conviction where a number of errors, taken together, prejudice a defendant's right to a fair trial." *State v. Ferguson*, 2005 MT 343, ¶ 126, 330 Mont. 103, 126 P.3d 463. Where there are a number of issues, the Court should analyze their overall effect together in the context of the evidence. *Alcala v. Woodford*, 334 F.3d 862, 883 (9th Cir. 2003) (citation and quotations omitted). As discussed, the evidence was not strong and relied heavily on inadmissible DNA evidence. The jury deadlocked; had it not heard the DNA evidence, it is possible it would have acquitted Norquay. Taken together with the dynamite charge that injected irrelevant considerations and undue pressure on the jury plus the prosecutor's misconduct, Norquay did not receive a fair trial.

CONCLUSION

The Court should reverse the convictions and remand for a new trial.

Respectfully submitted this ____ day of July, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

_____

JENNIFER A. HURLEY

APPENDIX